

Monitoring of flow on streams associated with the Lower Tuscan Formation is particularly important to the survival of Chinook salmon which use these "streams of interest" to spawn and where salmon fry rear. Intensive groundwater pumping would likely lower water table elevations near these streams of interest, decreasing surface flows, and therefore reducing salmon spawning and rearing habitat through dewatering of stream channels in these northern counties. This would be a significant adverse impact of the DWB and is ignored by the EA.

A similar effect has been observed in the Cosumnes River, where "[d]eclining fall flows are limiting the ability of the Cosumnes River to support large fall runs of Chinook salmon." This is a river that historically supported a large fall run of Chinook Salmon. *Id.* Indeed, "[a]n early study by the California Department of Fish and Game . . . estimated that the river could support up to 17,000 returning salmon under suitable flow conditions." *Id.*, citing CDFG 1957 & USFWS 1995. But "[o]ver the past 40 years fall runs ranged from 0 to 5,000 fish according to fish counts by the CDFG (USFWS 1995)," and "[i]n recent years, estimated fall runs have consistently been below 600 fish, according to Keith Whitener." (Fleckenstein, *et al.* 2004). Indeed, "[f]all flows in the Cosumnes have been so low in recent years that the entire lower river has frequently been completely dry throughout most of the salmon migration period (October to December)." *Id.*

Research indicates that "groundwater overdraft in the basin has converted the [Cosumnes River] to a predominantly losing stream, practically eliminating base flows..." (Fleckenstein, *et al.* 2004). And "investigations of stream-aquifer interactions along the lower Cosumnes River suggest that loss of base flow support as a result of groundwater overdraft is at least partly responsible for the decline in fall flows." *Id.* Increased groundwater withdrawals in the Sacramento basin since the 1950s have substantially lowered groundwater levels throughout the county." *Id.*

The draft EA acknowledges the potential for impacts to special status fish species from altered river flows and commits to maintaining flow and temperature requirements already in place. (EA at p. 70) The coalition would like to have greater assurance of this commitment after the Bureau and DWR's failure in February 2009 to meet the X2 standard. The Bureau and DWR should make X2 compliance and streams of interest monitoring in real time part of their permit amendment applications to the SWRCB this spring. If stream levels are affected by groundwater pumping, then pumping would cease.

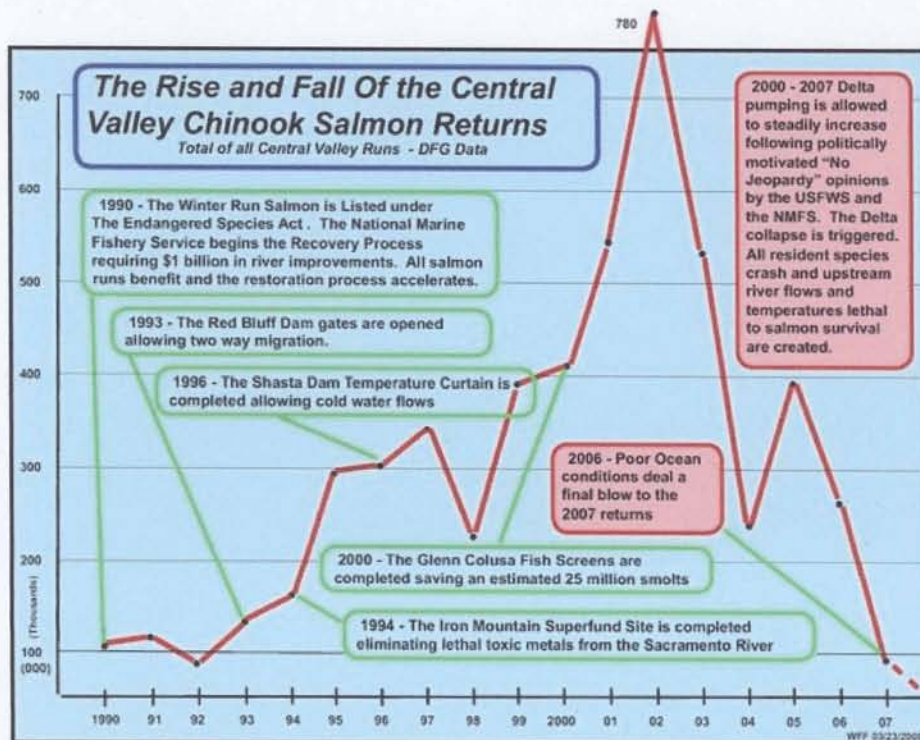
Unfortunately, the draft EA fails to anticipate possible stream flow declines in important salmon rearing habitat in the 2009 DWB area. Mud Creek is located within the 2009 DWB and flows through probable Tuscan recharge zones. While a charged aquifer is likely to add to base flow of this stream, a de-watered aquifer would pull water from the stream. According to research conducted by Dr. Paul Maslin, Mud Creek provides advantageous rearing habitat for out-migrating Chinook salmon. (Maslin 1996). Salmon fry feeding in Mud Creek grew at over twice the rate by length as did fry feeding in the main stem of the Sacramento River. *Id.*



Another tributary to the Sacramento River, Butte Creek, hosts spring-run Chinook salmon, a threatened species under the Endangered Species Act. 64 Fed. Reg. 50,394 (Sept. 16, 1999). Butte Creek contains the largest remaining population of the spring-run Chinook and is designated as critical habitat for the species. *Id.* at 50,399; 70 Fed. Reg. 52,488, 52,590-91 (Sept. 2, 2005). Additionally, Butte Creek provides habitat for the threatened Central Valley steelhead. See 63 Fed. Reg. 13,347 (Mar. 19, 1998); 70 Fed. Reg. at 52,518. The Bureau should not overlook the importance of rearing streams, and should not proceed with this Project unless and until adequate monitoring and mitigation protocols are established.

Existing mismanagement of water in California's rivers, creeks, and groundwater has already caused a precipitous decline in salmon abundance. There is no mention of the fall-run salmon numbers in the main stem Sacramento River or its essential tributaries despite the fact that their numbers dropped precipitously in 2007 (see graphic) and 2008. For the second year in a row, the commercial salmon fishery is closed for fear of pushing these fish to extinction. As noted above, the EA casually asserts that maintaining flow and temperature requirements in the main stem will be sufficient to protect aquatic species, but it fails to consider the impacts of up to 600,000 af of water transfers, fallowing, and groundwater substitution on the tributaries. How much additional pumping does the DWB represent, given CVP and SWP contractual commitments, available reservoir supplies, and other environmental restrictions south of the Delta? The EA and DWR's Addendum are silent on this.

Where are the data to support assertions that impacts to aquatic species will be below a level of significance? Habitat values are also essential to many other special status species that utilize the aquatic and/or riparian landscape including, but not limited to, giant garter snake, bank swallow, greater sandhill crane, American shad, etc. Where is the documentation of the potential impacts to these species?



Graphic is courtesy of Dick Pool.

In addition to the direct decline in the salmon populations is the food chain affect that will influence species such as killer whales.



**3. The EA fails to address the significant unknown risks raised by the 2009 DWB's proposed groundwater extraction.**

The EA fails to identify and address the significant unknown risks associated with this Project. There are substantial gaps in scientists' understanding of how the aquifer system recharges. 6-64

While the EA asserts that the Lower Tuscan is an isolated layer in the aquifer, expert opinion and experience suggest otherwise. Professor Karin Hoover from CSU Chico asserts that: "[T]o date there exists no detailed hydrostratigraphic analysis capable of distinguishing the permeable (water-bearing) units from the less permeable units within the subsurface of the Northern Sacramento Valley. In essence, the thickness and extent of the water-bearing units has not been adequately characterized." (p. 1)

Though the Projects fails to disclose the limitations in knowledge of the geology and hydrology of the northern counties, it was disclosed in 2008 in the EA for the *Stony Creek Fan Aquifer Performance Testing Plan* (Testing Plan EA). It revealed that there is also limited understanding of the interaction between the affected aquifers, and how that interaction will affect the ability of the aquifers to recharge. The Testing Plan EA provides:

*The Pliocene Tuscan Formation lies beneath the Tehama Formation in places in the eastern portion of the SCF Program Study Area, although its extent is not well defined. Based on best available information, it is believed to occur at depths ranging between approximately 300 and 1,000 feet below ground surface. It is thought to extend and slope upward toward the east and north, and to outcrop in the Sierra Nevada foothills. The Tuscan Formation is comprised of four distinct units: A, B C and D (although Unit D is not present within the general project area). Unit A, or Upper Tuscan Formation, is composed of mudflow deposits with very low permeability and therefore is not important as a water source. Units B and C together are referred to as the Lower Tuscan Formation. Very few wells penetrate the Lower Tuscan Formation within the SCF Program study area.*

The Testing Plan EA/FONSI at p. 23 (emphasis added). The Tehama Formation, however, generally behaves as a semi-confined aquifer system and the EA contains no discussion of its relationship with the adjoining formations. Nor is there any discussion of the role of the Pliocene Tehama Formation as "the primary source of groundwater produced in the area." (DWR 2003).



The EA fails to offer any in-depth analysis of which strata in the aquifers will be most likely affected by the 2009 DWB's proposed extraction of groundwater. The EA incorrectly states that, "Groundwater users in the basin pump primarily from deeper continental deposits." EA at p. 24. The majority of wells are in the upper layers of the aquifers since they are for domestic use, which is not even considered in the EA. In addition, the EA provides no assessment of the interrelationship of varying strata in the aquifers in the Sacramento Valley or between the aquifers themselves.

The EA fails to provide basic background information regarding the recharge of groundwater. The documents states, "Groundwater is recharged by deep percolation of applied water and rainfall infiltration from streambeds and lateral inflow along the basin boundaries." EA at p. 24. How was the conclusion reached that applied water leads to recharge of the aquifer? Where are the supporting data? This claim is unsubstantiated by any of the work that has been performed to date. For example, the RootZone water balance model used by a consultant with Glenn Colusa Irrigation District, Davids Engineering, was designed to simulate root zone soil moisture. It balances incoming precipitation and irrigation against crop water usage and evaporation, and whatever is left over is assigned to "deep percolation." Deep percolation in this case means below the root zone, which is anywhere from a few inches to several feet below the surface, depending on the crop. There is absolutely no analysis that has been performed to insure that applied water does, indeed, recharge the aquifer. For example, if the surface soils were to dry out, water that had previously migrated below the root zone might be pulled back up to the surface by capillary forces. In any case, the most likely target of the "deep percolation" water in the Sacramento Valley is the unconfined aquifer and possibly the Sacramento River. The EA has not demonstrated otherwise.

**E. Other resource impacts flowing from corrected chains of cause and effect are unrecognized in the EA and should be considered in an EIS instead.**

Regarding surface water reservoir operations in support of the 2009 DWB, we have several questions and concerns:

- We do not understand from the EA/FONSI which BiOps will govern the DWB's environmental compliance with the Endangered Species Act. The Bureau's EA is confusing at best on this point. Compare pages 8, 9, 22, and 70. We note that reliance on the 2004 OCAP biological opinions on Delta smelt and anadromous fisheries were declared unlawful by a federal judge in 2008 and should not be relied on.
- CVPIA water transfer rules should be stated as part of the "affected environment." Do they permit transfers to non-CVP urban water districts?

Regarding fisheries, we note that the Bureau intends to comply with the State Water Resources Control Board's Water Rights Orders 90-05 and 91-01 in order to provide temperature control at or below 56 degrees Fahrenheit for anadromous fish, their redds, and hatching wild salmonid fry, and to provide minimum instream flows of 3,250 cubic feet per second (cfs) between September



1 and February 28, and 2,300 cfs between March 1 and August 31. How will the Bureau and DWR comply with Fish and Game Code Section 5937—to keep fish populations below and above their dams in good condition, as they approves transfers of CVP water from willing CVP contractors to willing buyers? We urge this compliance effort be integrated with the streams of interest and groundwater monitoring programs we recommended above.

We also find confusing the EA's treatment of instream flows for fisheries. On one hand, minimum flows and temperature criteria established in the above-mentioned water rights orders is to be adhered to by the Bureau for the Sacramento River. The necessity for April and May storage is not well explained as well as the reasons that surface water releases from Shasta would occur in the July through September period. Why?

Concerning the social and economic effects of the proposed 2009 DWB, we note that UC Davis researcher Richard Howitt and his colleagues predict loss of 60,000 to 80,000 farm-related jobs in the Central Valley due to crop idling from drought effects and curtailed project deliveries for irrigation (though not specifically attributable to EA/FONSI activities). The EA neither identifies nor comments on this seemingly credible finding. Howitt, et al, do reasonably conclude that the bulk of these potential impacts are in the western San Joaquin and Tulare and Kern County areas where water rights for imported supplies are the most unreliable.

(Given the facts that DWB buyer requests exceed water supplies offered by potential sellers, and that the DWB priority criteria favor public health and municipal buyers over agricultural buyers, it does seem to us that the state and federal government should identify and commit to permanent mitigations for these acute economic dislocations resulting from drought. However, we would dispute, as discussed below, that this year's hydrologic conditions constitute a drought.)

On its own terms, the Bureau's EA makes no attempt to establish baseline agricultural crop acreages for each agricultural county offering or seeking DWB water in order to calculate and apply its 20 percent threshold for limiting economic impacts to agriculture in selling counties. Moreover, this 20 percent threshold needs to be incorporated into the description of the Proposed Action Alternative, since it appears to be an integral part of DWB actions.

In general, the 2009 DWB EA/FONSI—and by logical implication, DWR's Addendum—consistently avoids full disclosure of existing conditions and baseline data, rendering their justifications for the 2009 DWB at best incoherent, and at worst, dangerous to groundwater users and resources, and to vulnerable fisheries in tributary streams of the Sacramento River.

**F. The 2009 DWB is likely to have a cumulatively significant impact on the environment.**

The draft EA/FONSI does not reveal that the current Project is part of a much larger set of plans to develop groundwater in the region, to develop a "conjunctive" system for the region, and to integrate northern California's groundwater into the state's water supply. These are plans that the

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Bureau, together with DWR and others, have pursued and developed for many years. Indeed, one of the plans—the short-term phase of the Sacramento Valley Water Management Program—is the subject of an ongoing scoping process for a Programmatic EIS that has not yet been completed.

In assessing the significance of a project's impact, the Bureau must consider "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. §1508.25(a)(2). A "cumulative impact" includes "the impact on the environment which results from the incremental impact of the action when added to *other past, present and reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* §1508.7. The regulations warn that "[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into small component parts." *Id.* §1508.27(b)(7).

An environmental impact statement should also consider "[c]onnected actions." *Id.* §1508.25(a)(1). Actions are connected where they "[a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id.* §1508.25(a)(1)(iii). Further, an environmental impact statement should consider "[s]imilar actions, which when viewed together with other *reasonably foreseeable or proposed agency actions*, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id.* §1508.25(a)(3) (emphasis added).

As detailed below, instead of assessing the cumulative impacts of the proposed action as part of the larger program that even the Bureau has recognized should be subject to a programmatic EIS (but for which no programmatic EIS has been completed), the Bureau has attempted to separate this program and approve it through an inadequate EA. Further, the Bureau has failed to take into account the cumulative effects of other groundwater and surface water projects in the region, the development of "conjunctive" water systems, and the anticipated further integration of Sacramento Valley surface and ground water into the state water system.

#### **G. The Environmental Assessment Fails to Meet the Requirements of NEPA.**

Even if an EIS were not clearly required here, the draft EA/FONSI prepared by the Bureau violates NEPA on its own. As discussed above, the draft EA does not provide the analysis necessary to meet NEPA's requirements and to support its proposed finding of no significant impact. Further, as outlined above, the draft document fails to provide a full and accurate description of the proposed Project, its relationship to myriad other water transfer and groundwater extraction projects, its potentially significant adverse effects on salmon critical habitat in streams of interest tributary to the Sacramento River, and an assessment of the cumulative environmental impacts of the 2009 DWB when considered together with other existing and proposed water programs.



Additionally, the draft EA/FONSI fails to provide sufficient evidence to support its assertions that the 2009 DWB would have no significant impacts on the human or natural environments, neither decision makers nor the public are fully able to evaluate the significance of the 2009 DWB's impacts. These informational failures complicate the Coalition's efforts to provide meaningful comments on the full extent of the potential environmental impacts of the DWB and appropriate mitigation measures. Accordingly, many of the Coalition's comments include requests for additional information.

### **1. The EA Fails to Consider a Reasonable Range of Alternatives.**

NEPA's implementing regulations call analysis of alternatives "the heart of the environmental impact statement," 40 C.F.R. §1502.14, and they require an analysis of alternatives within an EA. *Id.* §1408.9. The statute itself specifically requires federal agencies to:

*study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning available uses of resources.*

42 U.S.C. §4332(2)(E). Here, because the Bureau's EA considers only the proposed Project and a "No Action" alternative, the EA violates NEPA.

The case law makes clear that an adequate analysis of alternatives is an essential element of an EA, and is designed to allow the decision maker and the public to compare the environmental consequences of the proposed action with the environmental effects of other options for accomplishing the agency's purpose. The Ninth Circuit has explained that "[i]nformed and meaningful consideration of alternatives ... is ... an integral part of the statutory scheme." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (holding that EA was flawed where it failed adequately to consider alternatives). An EA must consider a reasonable range of alternatives, and courts have not hesitated to overturn EAs that omit consideration of a reasonable and feasible alternative. *See People ex rel. Van de Kamp v. Marsh*, 687 F.Supp. 495, 499 (N.D. Cal. 1988); *Sierra Club v. Watkins*, 808 F.Supp. 852, 870-75 (D.D.C. 1991).

Here, there are only two alternatives presented: the No Action and the Proposed Action. The lack of *any* alternative action proposal is unreasonable and is by itself a violation of NEPA's requirement to consider a reasonable range of alternatives.

Even more significantly, there are numerous other alternative ways to ensure water is allocated reliably when California experiences dry hydrologic years. We described several elements of reasonable alternatives above. These are the alternatives that should have been presented for the Bureau's draft EA/FONSI on the 2009 DWB to comply with NEPA. 42 U.S.C. § 4332(2)(E).

### **2. The EA Fails to Disclose and Analyze Adequately the Environmental Impacts of the Proposed Action**



The discussion and analysis of environmental impacts contained in the EA is cursory and falls short of NEPA's requirements and stems from having an unclear and poorly described narrative for the proposed 2009 DWB. It obscures realistic chains of cause and effect, which in turn prevent accurate and comprehensive accounting of environmental baselines and measurement of the DWB's potential impacts. NEPA's implementing regulations require that an EA "provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. §1508.9(a). For the reasons discussed above, the EA fails to discuss and analyze the environmental effects of the water transfers, crop idling, and groundwater substitution proposed by the 2009 DWB. The Bureau must consider and address the myriad of environmental consequences that are likely to flow from this proposed agency action.

Along with our significant concerns about the adequacy of the proposed monitoring, the draft EA/FONSI also fails to explain what standards will be used to evaluate the monitoring data, and on what basis a decision to modify or terminate the pumping would be made. In light of the document's silence on these crucial issues, the draft EA/FONSI's conclusion that there will not be significant adverse impacts withers quickly under scrutiny.

### **3. The EA Fails to Analyze Cumulative Impacts Adequately.**

The Ninth Circuit Court makes clear that NEPA mandates "a useful analysis of the cumulative impacts of past, present and future projects." *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 810 (9th Cir. 1999). Indeed, "[d]etail is required in describing the cumulative effects of a proposed action with other proposed actions." *Id.* The very cursory cumulative effects discussion contained in the EA plainly fails to meet this standard.

As discussed in Part I.C. above, the proposed DWB does not exist in a vacuum, and is in addition to a broader program to develop regional groundwater resources and a conjunctive use system. The 2009 DWB is also only one of several proposed and existing projects that affect the regional aquifers. The existence of these numerous related projects make an adequate analysis of cumulative impacts especially important.

### **4. The Bureau Has Failed to Consider the Cumulative Impact of Other Groundwater Development and Surface Water Diversions Affecting the Region**

In addition to the improper segmentation evident in the draft EA/FONSI, the assessment of environmental impacts is further deficient because the Bureau has failed to consider the cumulative impacts of the proposed groundwater extraction when taken in conjunction with other projects proposed for the development of groundwater and surface water.



The Bureau and its contractors are party to numerous current and reasonably foreseeable water programs that are related to the water transfers contemplated in the DWB including the following:

- Sacramento Valley Integrated Regional Water Management Plan (2006)
- Sacramento Valley Regional Water Management Plan (January 2006)
- Stony Creek Fan Conjunctive Water Management Program
- Sacramento Valley Water Management Agreement (Phase 8, October 2001)
- Draft Initial Study for 2008-2009 Glenn-Colusa Irrigation District Landowner Groundwater Well Program
- Regional Integration of the Lower Tuscan Groundwater Formation into the Sacramento Valley Surface Water System Through Conjunctive Water Management (June 2005)
- Stony Creek Fan Aquifer Performance Testing Plan for 2008-09
- Lower Tuscan Integrated Planning Program, a program funded by the Bureau that will "integrate the Lower Tuscan formation aquifer system into the management of regional water supplies."
- Annual forbearance agreements (2008 had an estimated 160,00 acre feet proposed).

We briefly describe some of their key elements here.

Stony Creek Fan Conjunctive Water Management Program. The SCF Aquifer Plan is part of and in furtherance of the Stony Creek Fan Conjunctive Water Management Program ("SCF Program"). This program is being carried out by GCID, Orland-Artois and Orland Unit Water Association.

The long-term objective of the SCF Program is the development of a "regional conjunctive water management program consisting of a direct and in-lieu recharge component, a groundwater production component, and supporting elements...." (SVWMA: Project 8A Stony Creek Fan Conjunctive Water Management Program ("SVWMA Project 8A"), at 8A-1). The potential supply from such a program was estimated at 50,000 af per year to 100,000 af per year. *Id.*

The SCF Program has 3 Phases: (1) a feasibility study; (2) a demonstration project; and (3) project implementation. Phase I of the SCF Program has already been completed. The SCF Aquifer Plan described in a draft EA/FONSI is part of Phase II of the larger SCF Program. Phase III of the SCF Program will implement the program's goal of integrating test and operational production wells into the water supply systems for GCID, Orland-Artois, and Orland Unit Water Association for long-term groundwater production in conjunction with surface water diversions.

The Bureau is well aware of the SCF Program, but declined to analyze the environmental effects of the program as a whole, and not simply considered the effects of an isolated component of the larger program. Indeed, the Bureau recently awarded a grant to GCID to fund the SCF Program. The Bureau's grant agreement states that the SCF Program "target[s] the Lower Tuscan



Formation and possibly other deep aquifers in the west-central portion of the Sacramento Valley ... as the source for all or a portion of the additional groundwater production needed to meet [the SCF Partners'] respective integrated water management objectives." BOR Assistance Agreement No. 06FG202103 at p. 2. The agreement further provides that provides that "[a]dditional test wells and production wells will be installed within the Project Area." *Id.*

Moreover, the Bureau's own description of the reasons for not choosing the "No Action" alternative indicate the Bureau's recognition that the primary goal of the SCF Aquifer Plan is to realize the objectives of the SCF Program – "increas[ing] reliable water supplies through conjunctive management of groundwater and surface water" at a fast pace. *See* EA/FONSI at p. 5. The Bureau was obligated to assess the potentially significant environmental impacts associated with such conjunctive management of groundwater and surface water, and wholly failed to do so.

There are serious concerns raised by the proposal to engage in conjunctive management of groundwater and surface water that are not addressed in the EA. For example, in 1994, following seven years of low annual precipitation, Western Canal Water District and other irrigation districts in Butte, Glenn and Colusa counties exported 105,000 af of water extracted from the Tuscan aquifers to buyers outside of the area. This early experiment in the *conjunctive use* of the groundwater resources – conducted without the benefit of environmental review – caused a significant and immediate adverse impact on the environment. (Msangi 2006). Until the time of the water transfers, groundwater levels had dropped but the aquifers had sustained the normal demands of domestic and agricultural users. The water districts' extractions, however, lowered groundwater levels throughout the Durham and Cherokee areas of eastern Butte County. (Msangi 2006). The water level fell and the water quality deteriorated in the wells serving the City of Durham. (Scalmanini 1995). Irrigation wells failed on several orchards in the Durham area. One farm never recovered from the loss of its crop and later entered into bankruptcy. Residential wells dried up in the upper-gradient areas of the aquifers as far north as Durham (.

The SCF Program is a Component of the Sacramento Valley Water Management Program. The Sacramento Valley Water Management Program (Phase 8) ("SVWMP") also includes the SCF Program as one of its elements. (SVWMA Project 8A at pp. 8A-1 to 8A-13).

The SVWMP recognizes that the SCF Program "has the potential to improve operational flexibility on a regional basis resulting in measurable benefits locally in the form of predictable, sustainable supplies, *and improved reliability for water users' elsewhere in the state.*" *Id.* at p. 8A-2 (emphasis added). By piecemealing this program improperly and analyzing only the small component of the SCF Program, the Bureau has failed to assess the environmental impacts associated not just with the anticipated conjunctive use of the groundwater, but also the effect of the anticipated export of water to other regions of the state.

Additionally, approximately five years ago, on August 5, 2003, the Bureau published a notice in the Federal Register announcing its intention to prepare a programmatic EIS to analyze the short-



term phase of the SVWMP. 68 Fed. Reg. 46218, 46219 (Aug. 5, 2003). Like the SVWMP, this "Short-term Program" for which the Bureau stated its intent to conduct a programmatic EIS included implementation of the SCF Program. *Id.* at 46219, 46220.

The SCF Program is Also a Component of the Sacramento Valley Integrated Regional Water Management Program. The Bureau has been working with GCID and others to realize the Sacramento Valley Integrated Regional Water Management Program ("SVIRWMP"). SVIRWMP is comprised of a number of sub-regional projects, including the SCF Program. *See* SVIRWMP, Appendix A at A-5; BOR Assistance Agreement No. 06FG202103. Here again, even though the SCF Aquifer Plan is clearly a necessary component of the SCF Program – which is in turn a component of the SVIRWMP – the draft EA/FONSI failed to even acknowledge, let alone assess, the cumulative impacts of these related projects.

Most obviously, the draft EA wholly fails to assess the impact of the Bureau's *Sacramento Valley Regional Water Management Plan (2006)* (SVRWMP) and the forbearance water transfer program that the Bureau and DWR facilitate jointly. As noted above, the Programmatic EIS for the 2002 Sacramento Valley Water Management Agreement or Phase 8 Settlement was initiated, but never completed, so the SVRWMP was the next federal product moving the Phase 8 Settlement forward. The stated purpose of the Phase 8 Settlement and the SVRWMP are to improve water quality standards in the Bay-Delta and local, regional, and statewide water supply reliability. In the 2008 forbearance program, 160,000 af was proposed for transfer to points south of the Delta. To illustrate the ongoing significance of the demand on Sacramento Valley water, we understand that GCID alone entered into "forbearance agreements" to provide 65,000 af of water to the San Luis and Delta Mendota Water Association in 2008, 80,000 af to State Water Project contractors in 2005, and 60,000 af to the Metropolitan Water District of Southern California in 2003.

Less obvious, but certainly available to the Bureau, are the numerous implementation projects that Phase 8 signatories are pursuing, such as Glenn Colusa Irrigation District's (GCID) proposed to divert groundwater pumped from private wells to agricultural interests in the District. *See* Attach. (GCID Proposed Negative Declaration, GCID Landowner Groundwater Well Program for 2008-09). Additionally, the draft EA does not consider the cumulative effect of the Lower Tuscan Integrated Planning Program, a program funded by the Bureau that will "integrate the Lower Tuscan formation aquifer system into the management of regional water supplies." Grant Agreement at 4. This program, as described by the Bureau, will culminate in the presentation of a proposed water management program for the Lower Tuscan Formation for approval and implementation by the appropriate authorities. Clearly, the cumulative impact of this program and the 2009 DWB's proposed groundwater extraction should have been assessed.

Finally, with the myriad projects and programs that are ignored in the EA and have never been analyzed cumulatively, the EA finally discloses that there could be a devastating impact to



groundwater: "The recent reduction in recharge (due to the decrease in precipitation and runoff) in addition to the increase in groundwater transfers would lower groundwater levels. Multi-year groundwater acquisition for other programs in areas that have repeatedly transferred groundwater may also be more susceptible to adverse effects. In these areas groundwater levels may not fully recover following a transfer and may experience a substantial net decline in groundwater levels over several years." (EA at p. 94) While the honesty is refreshing, the lack of comprehensive monitoring, mitigation, and project cessation mechanisms is startling. This alone warrants the preparation of an EIS.

Here again, the document does not discuss or analyze these potential impacts, their potential scope or severity, or potential mitigation efforts. Instead, it relies on the existence of local ordinances, plans, and oversight with the monitoring and mitigation efforts of individual "willing sellers" to cope with any adverse environmental effects. However, as we have shown above, for example, the Glenn County management plan is untested and does not provide adequate protection and monitoring of the region's important groundwater resources. To further clarify the inadequacy of relying on local plans and ordinances, Butte County's Basin Management Objectives have no enforcement mechanism and Chapter 33 requires CEQA review for transfers that include groundwater in Butte County. As one can see, there is very limited local protection for groundwater and no authority to influence pumping that is occurring in a different county.

**5. The 2009 DWB is likely to serve as precedent for future actions with significant environmental effects.**

As set forth above, this Project is part of a broader effort by the Bureau and DWR to develop groundwater resources and to integrate GCID's water into the state system. For these reasons, the 2009 DWB is likely to "establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration" (40 C.F.R. §1508.27(b)(6)), and should be analyzed in an EIS.

**6. The 2009 DWB has potential adverse impacts for a threatened species.**

As the Bureau of Reclamation is well aware, the purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend and to conserve and recover those species so that they no longer require the protections of the Act. 16 U.S.C. § 1531(b), ESA § 2(b); 16 U.S.C. § 1532(3), ESA §3(3) (defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). "[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote species survival), but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F3d 1059, 1069 (9th Cir. 2004). To ensure that the statutory purpose will be carried out, the ESA imposes both substantive and procedural requirements on all federal agencies to carry out programs for the conservation of listed species and to insure that their actions are not likely to jeopardize the continued existence of any listed



species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536. See *NRDC v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (action agencies have an "affirmative duty" to ensure that their actions do not jeopardize listed species and "independent obligations" to ensure that proposed actions are not likely to adversely affect listed species). To accomplish this goal, agencies must consult with the Fish and Wildlife Service whenever their actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for "any action [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14. Agency "action" is defined in the ESA's implementing regulations to "mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02.

The giant garter snake ("GGS") is an endemic species to Central Valley California wetlands. (Draft Recovery Plan for the Giant Garter Snake ("DRP") 1). The giant garter snake, as its name suggests, is the largest of all garter snake species, not to mention one of North America's largest native snakes, reaching a length of up to 64 inches. Female GGS tend to be larger than males. GGS vary in color, especially depending on the region, from brown to olive, with white, yellow, or orange stripes. The GGS can be distinguished from the common garter snake by its lack of red markings and its larger size. GGS feed primarily on aquatic fish and specialize in ambushing small fish underwater, making aquatic habitat essential to their survival. Females give birth to live young from late July to early September, and brood size can vary from 10 to up to 46 young. Some studies have suggested that the GGS is sensitive to habitat change in that it prefers areas that are familiar and will not typically travel far distances. The EA discloses that one GGS study in Colusa County revealed the "longest average movement distances of 0.62 miles, with the longest being 1.7 miles, for sixteen snakes in 2006, and an average of 0.32 miles, with the longest being 0.6 miles for eight snakes in 2007. However, in response to droughts and other changes in water availability, the GGS has been known to travel up to 5 miles in only a few days, but the impacts on GGS survival and reproduction from such extreme conditions are unknown due to the deficiency in data and analysis.

Flooded rice fields, irrigation canals, and wetlands in the Sacramento Valley can be used by the giant garter snake for foraging, cover and dispersal purposes. The draft EA fails to comprehensively analyze the movements and habitat requirements for the federal and state-threatened giant garter snake and yet again defers responsibility to a future time. The Biological Assessment acknowledges the failure of Bureau and DWR to complete the Conservation Strategy that was a requirement of the 2004 Biological Opinion. (BA at p. 19-20) [The BA appears to have no page numbers] What possible excuse delayed this essential planning effort?

The 2009 DWB also proposes to delete or modify other mitigation measures previously adopted as a result of the EWA EIR process to substantially reduce significant impacts, but without showing they are infeasible. For example, the Bureau and DWR propose to delete the 160 acre maximum for "idled block sizes" for rice fields left fallow rather than flooded and to substitute for it a 320 acre maximum. (See 2003 Draft EWA EIS/EIR, p. 10-55; 2004 Final EWA EIS/EIR, Appendix B, p. 18, Conservation Measure # 4.) There is no evidence to support this change. In

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light of the agencies failure to complete the required Conservation Strategy mentioned above and the data gathered in the Colusa County study, how can the EA suggest that doubling the fallowing acreage is in any way biologically defensible? The agencies additionally propose to delete the mitigation measure excluding Yolo County east of Highway 113 from the areas where rice fields may be left fallow rather than flooded, except in three specific areas. (See 2004 Final EWA EIS/EIR, Appendix B, p. 18, Conservation Measure # 2.) What is the explanation for this change? What are the impacts from this change?

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Deleting these mitigation measures required by the EWA approval would violate NEPA and CEQA's requirements that govern whether, when, and how agencies may eliminate mitigation measures previously adopted under NEPA and CEQA. (See *Napa Citizens for Honest Government v. Napa County Board*.)

The 2009 DWB fails to include sufficient safeguards to protect the giant garter snake and its habitat. In order to avoid potentially significant adverse impacts for the snake, additional surveys should be conducted prior to any alteration in water regime or landscape. (Addendum March 4, 2009 at p. 8)

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It is conspicuously noticeable that there isn't a claim of a less-than-significant impact for the Giant Garter Snake (*Thamnophis gigas*), in the EA and the BA. There is really no conclusion reached due to the fundamental absence of science for the species. The Bureau should also prepare an EIS because the 2009 DWB will likely have significant environmental effects on the Giant Garter Snake, a listed threatened species under the federal Endangered Species Act and California Endangered Species Act. 40 C.F.R. §1508.27(b)(9).

6-83

## II. Purpose and Need Issues of the 2009 Drought Water Bank

### A. The Purpose and Need Section of the EA/FONSI fails to specify the policy framework upon which the 2009 Drought Water Bank is based.

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Exemption of the 2009 DWB from the requirements of the California Environmental Quality Act (CEQA) does not reflect the actual environmental effects of the proposal—which are similar to the proposed 1994 Drought Water Banks and for which a final Program Environmental Impact Report was completed in November 1993. In 2000, the Governor's Advisory Drought Planning Panel report, *Critical Water Shortage Contingency Plan* promised a program EIR on a drought-response water transfer program, but was never undertaken. Twice in recent history, the state readily acknowledged that CEQA review for a major drought water banking program was appropriate. So, this Notice of Exemption reflects an end-run around established water law through the use of water transfers, and is therefore vulnerable to legal challenge under the California Environmental Quality Act.

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We question the merits of and need for the 2009 DWB itself. The existence of drought conditions at this point in time is highly questionable and reflects the state's abandonment of a

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sensible water policy framework given our state and national economic recession and tattered public budgets. Our organizations believe the Governor's drought emergency declaration goes too far to help a few junior water right holders, and that at bottom the 2009 Drought Water Bank is not needed. The DWB is to directly benefit the areas of California whose water supplies are the least reliable by operation of state water law. Though their unreliable supplies have long been public knowledge, local, state, and federal agencies in these areas have failed to stop blatantly wasteful uses and diversions of water and to pursue aggressive planning for regional water self-sufficiency.

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The EA/FONSI's statement of purpose and need states specifically that "the purpose of the proposed action is to help facilitate the transfer of water throughout the State from willing sellers of CVP water upstream of the Delta to buyers that are at risk of experiencing water shortage in 2009." This paragraph omits coherent discussion of need. The purpose and need should also state that this transfer program would be subject to specific criteria for prioritizing transfers, as described on page 6: "It is anticipated that water made available to [potential buyers] from the DWB would be prioritized as flows: existing health and safety domestic needs, municipal supply subject to water shortage contingency plan measures, and agricultural irrigation for existing crops and livestock subject to water shortage contingency plan measures."

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The EA/FONSI makes no attempt to place the 2009 Drought Water Bank into the context of the 2005 California Water Plan that the state recently completed. It appears to us that this plan is largely on the shelf now, perhaps because of the state's dire fiscal problems. It does contain many good recommendations concerning increasing regional water self-sufficiency. However, our review of the 2005 California Water Plan reveals no mention of the 2000 Critical Water Shortage Reduction Marketing Program or any overarching drought response plan that the state could have planned for in 2005, but did not. We sadly conclude that the state of California has no meaningful adopted drought response policy, save for gubernatorial emergency declarations to suspend protective environmental regulations. This is not a sustainable water policy for California.

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The purpose and need section of the EA/FONSI *and the Governor's own drought emergency declaration* cry out for placing the 2009 Drought Water Bank into a policy framework. What is the state doing otherwise to facilitate regional water self-sufficiency for these areas with the least reliable water rights? How does the 2009 DWB fit into the state and federal government's water and drought policy framework? Instead, the state and federal response to this third consecutive dry year falls back on simply the Drought Water Bank model that ran into environmental and water users' opposition in 1991 and 1992. Is anybody home at our water agencies?

6-90

- B. The 2009 Drought Water Bank is not needed because the state's current allocation system—in which the federal Bureau of Reclamation participates—wastes water profiligately.**

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The incentive from the state's lax system of regulation of California's State Water Project and Central Valley projects is to deliver the water now, and worry about tomorrow later. Indeed, the State Water Resources Control Board (SWRCB) has been AWOL for decades. In response to inquiries from the Governor's Delta Vision Task Force last fall, the SWRCB acknowledged that while average runoff in the Delta watershed between 1921 and 2003 was 29 million acre-feet annually, the 6,300 active water right permits issued by the SWRCB is approximately 245 million acre-feet. In other words, **water rights on paper are 8.4 times greater than the real water in California streams diverted to supply those rights on an average annual basis.** *And the SWRCB acknowledges that this "water bubble" does not even take account of the higher priority rights to divert held by pre-1914 appropriators and riparian water right holders, of which there are another 10,110 disclosed right holders. Many more remain undisclosed.*

Like federal financial regulators failing to regulate the shadow financial sector, subprime mortgages, Ponzi schemes, and toxic assets of our recent economic history, the state of California has been derelict in its management of scarce water resources here. This in no way justifies suspension of environmental and water quality regulations, for which the Governor's drought emergency declaration calls. We supplement our comments on this matter of wasteful use and diversion of water by incorporating by reference the joint complaint to the State Water Resources Control Board of the California Water Impact Network and the California Sportfishing Protection Alliance on public trust, waste and unreasonable use and method of diversion as additional evidence of a systematic failure of governance by the State Water Resources Control Board, the Department of Water Resources and the U.S. Bureau of Reclamation, filed with the Board on March 18, 2008 (attached).

We question the Governor's contention of continued dry conditions, since the storms of early March have greatly increased reservoir levels throughout California. The Climate Prediction Center of the National Oceanographic and Atmospheric Administration believes the drought will ease by May 2009. Non-state and non-federal reservoirs indicate conditions fast approaching normal for their facilities: Bullard's Bar in Yuba County is at 107 percent of the 15-year average for this time of year, EBMUD's Pardee Lake is at 98 percent of normal, San Francisco's Hetch Hetchy Reservoir on the Tuolumne River is at 169 percent of normal, while Don Pedro Reservoir on the same river is at 90 percent. The CVP's Millerton (101 percent of normal) and Folsom reservoirs (112 percent) exceed the normal storage for this time of year. These two reservoirs must provide water to the agricultural San Joaquin River Exchange Contractors, and who have among the most senior rights on that river. Rice growers in the Sacramento Valley are generally expecting close to full deliveries from the CVP and Yuba River water supplies. The CVP's own New Melones Reservoir on the Stanislaus River, which contributes to Delta water quality as well as to meeting eastern San Joaquin Valley irrigation demands, is at 87 percent of normal for this time of year.

Moreover, the SWP's terminal reservoirs at Pyramid (102 percent of average) and Castaic (99 percent of average) Lakes are right at about normal storage levels for this time of year,



presumably because DWR has been releasing water from Oroville for delivery to these reservoirs.

The fact that reservoirs of the CVP with more senior responsibilities in the water rights hierarchy do well with storage for this time of year suggests that at worst this will be a year of below normal runoff in 2009—hardly a drought scenario. Low storage levels at Oroville, Shasta and San Luis may easily be attributed to redirected releases to terminal reservoirs or groundwater banks in the San Joaquin Valley and Tulare Lake Basin—these latter storage venues and their current performance are not disclosed on DWR's Daily Reservoir Storage levels web site. Still, given what is known, from what these reservoir levels indicate many major cities and most Central Valley farmers are very likely will have enough water for this year.

The ones expecting to receive little water this year do so because of the normal functioning of their water rights—their imported surface supplies are therefore less reliable in dry times. It is the normal and appropriate functioning of California's system of water rights law that makes it so. Among those with more junior water rights, the Metropolitan Water District and the Santa Clara Valley Water District are the wealthiest regions and the agencies most capable of undertaking aggressive regional water self-sufficiency actions. They should be further encouraged and assisted to do so through coherently formulated state and federal water policies and programs.

On the agricultural side, the drought emergency declaration appears to benefit mainly the few western San Joaquin Valley farmers whose contractual surface water rights have always been less reliable than most—and whose lands are the most problematic for irrigation. In excess of 1 million acres of irrigated land in the San Joaquin Valley and the Tulare Lake Basin are contaminated with salts and trace metals like selenium, boron, arsenic, and mercury. These lands should be retired from irrigation to stop wasteful use of precious fresh water resources. This water drains back—after leaching from these soils the salts and trace metals—into sloughs and wetlands and the San Joaquin River carrying along these pollutants. Retirement of these lands from irrigation usage would help stem further bioaccumulation of these toxins that have settled in the sediments of these water bodies.

The 2009 DWB would exacerbate pumping of fresh water from the Delta, which has already suffered from excessive pumping in earlier years of this decade. Pumped exports cause reverse flows to occur in Old and Middle Rivers and can result in entrainment of fish and other organisms in the pumps. Our organizations share the widely held view that operation of the Delta export pumps is the major factor causing the Pelagic Organism Decline (POD) and in the deteriorating populations of fall-run Chinook salmon. 2009 will be the second consecutive year where no commercial fishing of fall-run Chinook fish will be allowed because of this species' population decline. Operation of the DWB at a time when others refrain from taking these fish and other organisms strikes us as a consummate unwillingness on the part of the State of California and the U.S. Bureau of Reclamation to share in the sacrifices needed to help aquatic ecosystems and anadromous fisheries of the Bay-Delta Estuary recover.



New capital facilities should be avoided to save on costly, unreliable, and destructive water supplies that new dams and canals represent. Moreover, these facilities would need new water rights; yet the most reliable rights in California are always the ones that already exist—and of those, they are the ones that predate the California State Water Project and the federal Central Valley Project. We should be applying our current rights far more efficiently—and realistically—than we do now. California should instead pursue a “no-regrets” policy incorporating aggressive water conservation strategies, careful accounting of water use, research and technological innovation, and pro-active investments.<sup>5</sup>

6-95

### III. Conclusion

The Bureau’s EA/FONSI states on page 9:

*California laws contain numerous protections that apply to water transfers. However, there are three fundamental principles that apply: no injury to other legal users of water, no unreasonable effects to fish, wildlife, or other instream beneficial uses of water, and no unreasonable effects on the overall economy or the environment in the counties from which the water is transferred.*

We unreservedly state to you that the draft EA/FONSI on the proposed 2009 Drought Water Bank appears to describe a project that would fail all three of these tests as currently described. The 2009 Drought Water Bank clearly has the potential to affect the human and natural environments, both within the Sacramento Valley as well as in the areas of conveyance and delivery. It is entirely likely that injuries to other legal users of water, including those entirely dependent on groundwater in the Sacramento Valley, will occur if this project is approved. Groundwater, fishery and wildlife resources are likely also to suffer harm as instream users of water in the Sacramento Valley. And the economic effects of the proposed DWB are at best poorly understood through the EA/FONSI. To its credit, at least the Bureau studied the proposed project, while DWR, with the Governor’s assistance, went the route of exempting it from CEQA, thereby enabling the agency to ignore these potential effects.

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Taken together, the Bureau and DWR treat these serious issues carelessly in the EA/FONSI, and in DWR’s specious reliance for environmental compliance on an emergency exemption and the Environmental Water Account EIS/R of 2003 and 2007. In so doing, they deprive decision makers and the public of their ability to evaluate the potential environmental effects of this Project, and violate the full-disclosure purposes and methods of both the National Environmental Policy Act and the California Environmental Quality Act.

<sup>5</sup> See especially, Pacific Institute, *More with Less: Agricultural Water Conservation and Efficiency in California, A Special Focus on the Delta*, September 2008; Los Angeles Economic Development Corporation, *Where Will We Get the Water? Assessing Southern California’s Future Water Strategies*, August 2008, and Lisa Kresge and Katy Mamen, *California Water Stewards: Innovative On-farm Water Management Practices*, California Institute for Rural Studies, January 2009.



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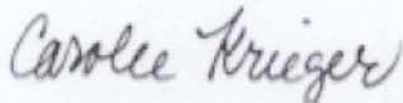
Our organizations request advance notification of any meetings that address this proposed Project or any other BOR projects in Butte, Colusa, Glenn, or Tehama counties that require consideration of NEPA/CEQA as well as water rights applications that will be needed as the 2009 DWB moves forward. Please add C-WIN, CSPA, BEC, and the Center for Biological Diversity to your basic public notice list on this Project, and send us each any additional documents that pertain to this particular Project.

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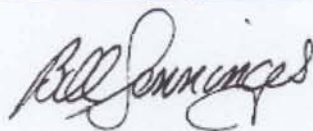
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